1991

Benchmark, INC v. Salt Lake Valley Mental Health Board : Response to Petition for Rehearing

Utah Supreme Court

Thomas T. Billings; David L. Arrington; Bryon J. Benevento; Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Appellee.
Joseph C. Rust; Kesler & Rust; John M. Wunderli; Attorneys for Appellants.

UT.. ..E COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

BENCHMARK, INC., a Utah corporation, Plaintiff/Appellee, v. SALT LAKE VALLEY MENTAL HEALTH BOARD, INC., a Utah corporation, and SALT LAKE COUNTY, a political entity, Defendants/Appellants.	RESPONSE TO PETITION FOR REHEARING Civil No. 910393 Priority No. 16

Appealed from: The Third Judicial District Court for Salt Lake County, State of Utah. The Honorable Richard H. Moffat. Civil No. 900901479PR

Attorneys for Plaintiff/Appellee:

Thomas T. Billings (0331)
David L. Arrington (2467)
Bryon J. Benevento (5254)
VAN COTT, BAGLEY, CORNWALL & McCARTHY
50 So. Main St., Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

Attorneys for Defendants/Appellants:

Joseph C. Rust (2835)
KESLER & RUST
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 355-9333

John M. Wunderli (3569)
2001 South State Street #S2600
Salt Lake City, UT 84190-2450
Telephone: (801) 468-2360

IN THE SUPREME COURT OF THE STATE OF UTAH

BENCHMARK, INC., a Utah corporation, Plaintiff/Appellee, v. SALT LAKE VALLEY MENTAL HEALTH BOARD, INC., a Utah corporation, and SALT LAKE COUNTY, a political entity, Defendants/Appellants.	RESPONSE TO PETITION FOR REHEARING Civil No. 910393 Priority No. 16

Appealed from: The Third Judicial District Court for Salt Lake County, State of Utah. The Honorable Richard H. Moffat. Civil No. 900901479PR

Attorneys for Plaintiff/Appellee:

Thomas T. Billings (0331)
David L. Arrington (2467)
Bryon J. Benevento (5254)
VAN COTT, BAGLEY, CORNWALL & McCARTHY
50 So. Main St., Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

Attorneys for Defendants/Appellants:

Joseph C. Rust (2835)
KESLER & RUST
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 355-9333

John M. Wunderli (3569)
2001 South State Street #S2600
Salt Lake City, UT 84190-2450
Telephone: (801) 468-2360

TABLE OF AUTHORITIES

TABLE OF CONTENTS

JOSEPH C. RUST (2835)
KESLER & RUST
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 355-9333

JOHN M. WUNDERLI (3569)
2001 South State Street #S2600
Salt Lake City, Utah 84190-2450
Telephone: (801) 468-2360

Attorneys for Defendants/Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

BENCHMARK, INC., a Utah corporation, Plaintiff/Appellee, v. SALT LAKE VALLEY MENTAL HEALTH BOARD, INC., a Utah corporation, and SALT LAKE COUNTY, a political entity, Defendants/Appellants.	Case No. 910393

RESPONSE TO PETITION FOR REHEARING

Plaintiff/appellee Benchmark has petitioned the court to rehear one specific aspect of the court's decision on defendants' Motion for Summary Disposition. That one aspect is the court's

ruling that damages, if any, are limited to $40,000.00 plus six months' rent. Benchmark's petition attempts to divide that one ruling into two issues, namely, one of contract ambiguity and one of law concerning the effect of termination notices on lease agreements. In actuality, in this case those are not two separate subjects but really are part and parcel of the same subject. However, they will be addressed separately for the purpose of responding specifically to Benchmark's petition.

THERE IS NO AMBIGUITY IN THE CONTRACT WHICH WOULD MAKE IT SUBJECT TO PAROL EVIDENCE

Benchmark has argued that the termination clause in question is ambiguous because it could have two possible meanings and therefore the parties' intent would need to be factually explored. That claim is somewhat ironic since it was Benchmark who initially argued there were no material issues of fact in this case and that, as a consequence, it was entitled to Summary Judgment as a matter of law. Benchmark is now saying the contract is ambiguous and that there are issues of fact remaining to be decided by the court.

As was noted in defendants/appellants' original Motion for Summary Disposition, the contract term is not ambiguous. The intent of the parties is clear. The ambiguity that Benchmark

attempts to raise is in reality two different legal approaches to the contract rights contained within the subject clause. As was noted in defendants' original Motion, some courts take the position that a breach occurs when the notice of termination has not been given as exactly provided in the contract. Nonetheless, even under that interpretation, damages are limited to the amount which would have been obtained if the proper notice had been given. The second theory is that there is no breach but rather the defective notice is constructively deemed to extend to the proper time called for in the contract. The point is, under either theory the end result is exactly the same.

In the instant case, defendants claimed that they terminated the lease "for cause." This issue has now been remanded to the trial court for a factual determination. The defendants also claim that at the very least they terminated the lease "without cause." If defendants are correct that they terminated the lease for cause, the damage limitation issue is moot. On the other hand, if it is determined, that defendant Salt Lake Mental Health did not terminate for cause, then the damage limitation issue is relevant.

The issue at hand is created by the fact that the Lease allowed termination without cause upon six (6) months notice. If notice was given, then the Lease was terminated and future rent

waived except for six (6) months rent plus a portion of Benchmark's remodeling costs, not to exceed $40,000. The defendants gave notice of termination on October 31, 1989 with a termination date of January 1, 1990. Benchmark claims that the failure of the defendants to give a full six (6) months notice means the lease is still in full force and effect. Thus, the damage would be the rent for the remaining term of the Lease. The defendants maintain that the fact that the notice did not give a full six (6) months notice does not affect the damage limitation provision of the Lease and damages are at most six (6) months rent plus $40,000.00.

Where a tenant gives a notice to terminate a lease but does not give the sufficient time period, some courts hold that the measure of damages would be the damages to which the landlord would have been entitled had the proper notice been given. Hence, the damages are limited to rent for the termination period and any other contractual damages. In the case at bar, this amount would be six (6) months rent plus the $40,000.00. Other courts would say that in such a case the defective termination notice is construed to take effect at the end of the full six months. In application of either line of cases, the damages are limited to $40,000.00, plus six months of rent. Regardless of which legal position is taken, the clause remains the same and does not present two different factual interpretations as to what it means.

Benchmark argues that giving proper notice "is a condition precedent to the limitation of damages". Benchmark's Petition for Rehearing, p.4. That is clearly an argument of the application of law. It is not evidence of a factual ambiguity in the contract's terms. Moreover, defendants submit that Benchmark's interpretation is even bad law, as will be discussed more fully hereinafter.

This court has the clause before it. The court can see for itself that the language is clear and unambiguous. In fact Benchmark has not even suggested how parol evidence would change the interpretation. The only differences in interpretation relate to different legal theories. There is thus no basis for parol evidence to be introduced to interpret that language since the intent of the parties is not in question. See, e.g., Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1989); Utah Valley Bank v. Tanner, 636 P.2d 1060 (Utah 1981).

THE LIMITATION ON DAMAGES SET BY THIS COURT SHOULD STAND

Benchmark contends that the cases cited by defendants/appellants in their Motion for Summary Disposition are employment cases and that somehow employment cases enjoy a special rule regarding termination notices, which rule is not applicable to interpretating termination rights in leases. Benchmark is in

error on both points. Osborn v. Commanche Cattle Industries, Inc., 545 P.2d 827 (Okl. App. 1975) involved a contract for the maintenance of certain feedlot facilities. It was not a case of an employer and an employee but rather two separate businesses engaged in a contract. Likewise in Shain v. Washington National Insurance Co., 308 F.2d 611 (8th Cir. 1962), the parties were an insurance company and a general agent. The general agent complained about the termination of his agency agreement, i.e., his business, not about the termination of his employment. Further, the court in Shain made it clear that the principle they were applying was valid, regardless of the type of contract:

> And it is the general rule that where a contract, whether it be one for employment or for insurance or of a different kind, requires written notice of cancellation upon a stated time, a notice failing to meet the time requirement, but otherwise appropriate, is nonetheless effective upon the lapse of the time required by the contract.
>
> Id. at. 614. Emphasis added.

Perhaps the better question to ask is whether the landlord/tenant relationship is so different from other types of contracts that a rule which might be applicable to that relationship would not be applicable to any other contract relationship or vice versa. The argument raised by Benchmark is that an employment relationship does not contemplate substantial

capital expenditures and hence strict compliance with a termination notice is "less significant in an employment action." Benchmark's Petition for Rehearing, p.9. That comment ignores the substantial financial commitment an employee may make in moving to a new location to take a specific job. It also fails to note that Benchmark's bargain with defendants was that at any time the lease was terminated by the tenants without cause, the landlord would be entitled to six months of rent plus a percentage of the remodeling costs, not to exceed $40,000.00. With that type of a guarantee, Benchmark would presumably be able to have sufficient rent and monies to cover any potential loss if defendants left the premises early.

Most importantly, that argument by Benchmark has been nullified by this court recently when it declared that landlord/tenant law is to be governed by general principles of contract law. Wade v. Jobe, 818 P.2d 1006, 1010, 1015 (Utah 1991). Thus the attempt by Benchmark to claim special provisions of law applicable to this case because it involves a lease is without foundation in the law.

The number of cases supporting the principles enunciated in both the Osborn case and the Shain case is impressive. The following cases follow the rule annunciated in Shain that if the notice is deficient, it will be construed by the court to extend

to the period which would have been sufficient under the contract terms. Interestingly enough, many of these cases involve landlord/tenant disputes over lease terminations.

In the case of Camalier & Buckley-Madison, Inc. v. Madison Hotel, Inc., 513 F.2d 407 (D.C. Cir. 1975), the issue was whether a landlord's notice to quit was sufficient, since it did not give the full five days required by the lease. The court held that if there was a deficiency, the court would extend the notice to the proper day and assess damages up to that proper day.

See also Raynor v. Burroughs Corp., 294 F.Supp. 238 (E.D. Va. 1968); All States Service Station, Inc. v. Standard Oil Co., 120 F.2d 714 (D.C. Cir. 1941); Medical Professional Bldg Corp. v. Ferrell, 131 S.W.2d 683 (Tex. App. 1939) (90 day termination notice in lease); Worthington v. Moreland Motor Truck Co., 140 Wash. 528, 250 Pac. 30 (1926) (month to month tenancy); G.B. Kent & Sons, Ltd. v. Helena Rubenstein, Inc., 47 N.Y.2d 561, 393 N.E.2d 460 (1979); Entis v. Atlantic Wire & Cable Corp., 335 F.2d 759 (2nd Cir. 1964).

The following cases, like Osborn, limit the damages to those which would have been recovered if the proper termination notice had been given. See, e.g., Cottman v. State, Dept. of Natural Resources, 51 Md. App. 380, 443 A.2d 638 (1982) (breach of lease damages limited to those incurred during termination period); W.K. Ewing Co. v. New York State Teachers Retirement Sys., 197

N.Y.S.2d 364 (N.Y. App. 1960); Pecarovich v. Becker, 248 P.2d 123 (Cal. App. 1952).

Interestingly enough, none of the cases which extend the defective termination to the proper period have ever commented on the cases which call for strict enforcement of the termination notice provisions but then limit the damages. The same is true of the damage cases in commenting on the cases which have applied the so-called erroneous date rule. For whatever reason this is, the important aspect is that they basically reach the same result. It is also clear that they are the majority position with respect to an at-will termination clause in any type of contract.

Although to the best knowledge of defendants there is no specific Utah case on point, the issue is not really one of first impression in Utah. Utah law on contract damages specifically limits damages to the amount bargained for. Young Elec. Sign Co. v. United Standard West, Inc., 755 P.2d 162 (Utah 1988). Thus where the contract provided that the tenant could terminate at will, then the measure of damages is that provided in the lease for such early termination and not the lease payments over the rest of the term of the lease. Accord, Dalton Properties, Inc. v. Jones, 100 Nev. 422, 683 P.2d 30 (1984). In the present case, the limit of Benchmark's damages have also been contractually set. The defendants could terminate at any time and the maximum that

defendants would have to pay was $40,000.00 plus the six months rent (and of course would have to pay nothing if there was cause for the termination).

The reference by Benchmark to Reid v. Mutual of Omaha Ins, Co., 776 P.2d 896 (Utah 1989) is misleading and not applicable to the issues in this case. Even Benchmark admits in its Petition for Rehearing that in Reid, there was no right by the tenant to terminate at will. Hence, there was no termination clause which had to be interpreted and no right of the tenant to reduce the amount of rent owed through use of the termination clause. Therefore, the ruling in that case that the rental for the entire period was owing is completely understandable. Reid simply has no application to this case. If there was no termination at will clause in the instant case, the parties would not even be arguing this point and this court would not have ruled as it did. It is precisely because there is such an at will termination clause that the issue of limitation of damages is before the court.

Benchmark has also cited to the court three cases which it claims speak for the proposition that if a termination notice is not given as specifically prescribed in the contract, then there is a breach and the damages run for the full period of the lease. At best, the cases cited by Benchmark are in the minority. Further, the case of Deschenes v. Congel, 149 Vt. 579, 547 A.2d 1344 (1988)

can easily be distinguished from the instant case. In that case not only did the tenant not give the proper termination notice, but the tenant then sublet the premises and through that subtenant continued occupation of the premise for the remainder of the lease term. The Vermont court followed the line of cases that hold a failure to give proper termination notice does not invoke the termination clause. However the court did not get to the remaining portion of that line of cases which limits the damages to that which would otherwise have been applicable, because the tenant continued in possession. Thus the court in that case properly ruled that the rent would continue during that period of possession.

The cases of National Alfalfa Dehydrating & Milling Co. v. 4010 Washington, Inc., 434 S.W.2d 757 (Mo. App. 1968) and A. Dubois & Son, Inc. v. Goldsmith Bros., 273 App. Div. 306, 77 N.Y.S. 2d 473 (1948), appear to have required a strict notice compliance and no limitations on damages. However, both cases were from the intermediate appellate court level and neither have been cited on this proposition in any subsequent cases. Moreover, Dubois does not appear to be good law in New York, as is evident from the more recent case of G.B. Kent & Sons, Ltd. v. Helena Rubinstein, Inc., 47 N.Y.2d 561, 393 N.E.2d 460 (1979), which is a decision by the

highest state court in New York, and which clearly follows the erroneous date rule.

CONCLUSION

When defendants gave their notice of termination, they believed that they were entitled to terminate for cause. This court has determined that that remains a factual issue for which this case has been remanded to the trial court. Benchmark would require defendants to forfeit their right to the limitation on damages which they could invoke at any time by giving six months notice, because they sought to terminate for cause. The Lease Agreement specifically provided defendants with the right of immediate termination for cause as well as the right of termination at will upon six months notice. Since the two rights of termination do not require the same notice periods, the Lease had to contemplate that a termination notice for cause would also invoke the longer notice period required for termination at will. Thus, if the termination for cause were not upheld, at the very least the termination at will clause would come into play. That is the position of the law as well.

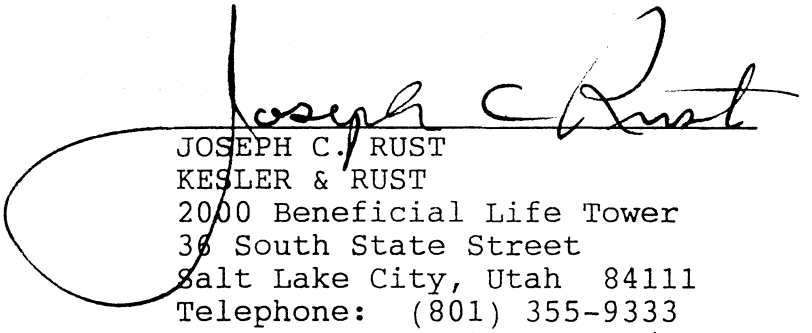
The six months rent plus $40,000.00 cap was agreed to by Benchmark. It knew that at any time defendants could terminate and

pay limited damages. This court should continue to sustain that limitation and deny the Petition by Benchmark.

Respectfully submitted.

DATED this 5th day of March, 1992.

KESLER & RUST



JOSEPH C. RUST
KESLER & RUST
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 355-9333
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby declare that I caused to be hand-delivered a true and correct copy of the foregoing **RESPONSE TO PETITION FOR REHEARING** in Civil No. 910393, this 5th day of March, 1992, to:

Thomas T. Billings
David L. Arrington
Bryon J. Benevento
VAN COTT BAGLEY CORNWALL & McCARTHY
50 South Main
Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84144
Telephone: (801) 532-3333

Lisa Holladay

t:reppet.ben2